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No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

COLUMBIA RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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April 5, 1985

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This Brief in Opposition is submitted on behalf of the following respondents, which for convenience are referred to collectively as the "Columbia Respondents" or "these respondents":

Columbia Rural Electric Association, Inc.

Blachly-Lane County Cooperative Electric Association

Central Electric Cooperative, Inc.

Columbia Basin Electric Cooperative, Inc.

Consumers Power, Inc.

Coos-Curry Electric Cooperative, Inc.

Douglas Electric Cooperative, Inc.

Hood River Electric Cooperative

Lane Electric Cooperative, Inc.

Midstate Electric Cooperative, Inc.

Salem Electric

Umatilla Electric Cooperative Association

Wasco Electric Cooperative, Inc.

Kootenai Electric Cooperative, Inc.

Fall River Rural Electric Cooperative, Inc.

Lost River Electric Cooperative, Inc.

Raft River Rural Electric Cooperative, Inc.

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QUESTIONS PRESENTED

1. Was there an unconstitutional taking of private property when the Washington Supreme Court decided, based on long-standing principles of state law, that Washington municipal corporations lacked authority to enter into an agreement with another Washington municipal corporation (WPPSS) regarding the latter's construction of two nuclear power plants in Washington and that consequently the agreement was unenforceable, where as a result of the unenforceability of the agreement WPPSS may lack sufficient revenues to meet its financial obligations to its bondholders?

2. Did the Washington Supreme Court deprive WPPSS, or holders of municipal revenue bonds issued by WPPSS, of "property" "without due process of law," by deciding that an agreement between WPPSS and the respondent utilities was unenforceable under Washington law, where in reaching its decision the court

(a) relied on the text of the agreement in considering as a matter of law whether Washington municipal corporations had authority to enter into such an agreement under Washington law,

(b) held that the doctrine of equitable estoppel was inapplicable where the representations relied on by the parties invoking the doctrine were as to matters of law not fact, the parties relying on the representations had the same opportunity to determine the truth of the representations as the parties making them, and in opposing entry of summary judgment the parties invoking the doctrine failed to present any evidence, by affidavit or otherwise, of any facts upon which such estoppel could be based,

(c) correctly pointed out that interested parties could have sought a prior declaratory judgment on the validity of the agreement in question, and

(d) disregarded the frivolous contention, raised for the first time after the court had already rendered an adverse decision,

that two of the justices should have disqualified themselves because they resided in areas where electrical service was provided by a respondent utility?

PARTIES TO THE PROCEEDINGS

Petitioner Washington Public Power Supply System (WPPSS) is a type of Washington municipal corporation called a "joint operating agency" consisting of various "members" which are Washington cities and public utility districts. It is a separate corporate body under Washington law. Although the number and identity of its members have changed over the years, during most of the relevant period its members were four cities and nineteen public utility districts in Washington.

Petitioner Chemical Bank is the bond trustee appointed as such under WPPSS Board of Directors Resolution No. 890 (the Bond Resolution) pursuant to which WPPSS issued municipal revenue bonds in the principal amount of $2.25 billion to raise funds for the construction of two nuclear power plants (WPPSS Projects 4 and 5) in Washington.

The 88 respondents named by petitioners consist of 45 municipal corporations (nineteen public utility districts, eight cities, one town and one irrigation district in Washington, four peoples' utility districts and seven cities in Oregon, and five cities in Idaho) and 43 rural electric cooperatives (thirteen in Washington, thirteen in Oregon, eleven in Idaho, four in Montana, one in Wyoming and one in Nevada) which signed a Participants' Agreement with WPPSS relating to the anticipated construction by WPPSS of its Nuclear Projects 4 and 5. This case concerns the validity and enforceability under Washington law of the Participants' Agreement between the respondent "participants" and WPPSS; it does not concern the validity and enforceability of the $2.25 billion in revenue bonds issued by WPPSS pursuant to the Bond Resolution.

The seventeen respondents on whose behalf this Brief In Opposition is submitted are listed on the inside front cover. They are rural electric cooperatives located in Washington,

Oregon and Idaho and have no parent companies, subsidiaries or affiliates within the meaning of Rule 28.1 of this Court.

Petitioners failed to include in their list of respondents two groups of intervenors in the proceedings below. One group consisted of ratepayer associations and individual ratepayers of certain Washington public utility districts, and the other group consisted of ratepayers of the City of Ellensburg, Washington. In addition, a group of individual bondholders moved unsuccessfully to intervene in the proceedings before the Washington Supreme Court. They have filed in this Court a separate Petition for Certiorari (No. 84-1414) seeking review of the Washington Supreme Court's denial of their motion to intervene.

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STATEMENT OF THE CASE

Petitioners' statement of the case is almost wholly unsupported by the record and is filled with mischaracterizations and distortions of the facts. Petitioners' legal arguments are premised on these mischaracterizations. While these respondents' arguments necessarily address many of these misstatements and omissions, it is important to correct several of petitioners' factual distortions at the outset.

Mischaracterizing the genesis of the underlying agreements giving rise to this litigation, petitioners would have this Court believe that the respondents, almost all of which are small rural utilities with no expertise regarding nuclear power construction and little or no knowledge of the municipal bond market, somehow masterminded a grand scheme to separate sophisticated investors in tax-free bonds from their money. The fact of the matter, established by numerous uncontroverted affidavits, is that the Participants' Agreement for WPPSS Projects 4 and 5 was forced upon the participants by WPPSS and the Bonneville Power Administration (BPA), under threat of BPA's "notice of insufficiency," with most participants having no meaningful option but to sign.[1] Indeed, prior to the first appeal to the Washington Supreme Court, the trial court had ruled that one of the "genuine issues of material fact" remaining for trial was whether there was "procedural unconscionability" in the way the participants were induced to sign the Agreement.[2]

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[1]BPA is a federal agency which markets power from the federal hydroelectric system in the Pacific Northwest. Nearly all of the respondent utilities depend entirely on BPA for their power supply. BPA's extensive involvement in planning and promoting WPPSS Projects 4 and 5 and its strongarming the respondents by threatening them with regional power shortages if they did not sign the Participants' Agreement, is described in Falk, *"Prelude to the State WPPSS Cases: The BPA as Broker,"* 6 Municipal Finance Journal 41 (Winter 1985).

[2]First Supplemental Order On Motions For Summary Judgment, Jan. 26, 1983, ¶ 9. Petitioner Chemical Bank recently filed a brief in related litigation in the United States District Court for the Western District of Washington

Petitioners' statements that tiny municipalities like the City of Drain, Oregon or rural electric cooperatives like Lost River Electric Cooperative in Mackay, Idaho (a town of 500 people about 100 miles northwest of Idaho Falls) "directed" the issuance of $2.25 billion in municipal bonds and "supervised" the expenditure of such sums on the two nuclear projects (Pet. at 3) are untrue, unsupported by the record, and contrary to common sense. The financing and construction program for WPPSS Projects 4 and 5 was a massive undertaking, drawing on all the financial muscle and expertise that Wall Street and the nuclear industry could muster. Petitioners cannot pretend that this massive program was "directed" and "supervised" by small-town mayors and farmers in the Pacific Northwest.[3]

Petitioners' statements that the participants "expressly assured" prospective purchasers of the bonds issued by WPPSS that the bonds would be repaid and "repeatedly told prospective purchasers that they possessed authority to give such assurances" (Pet. at 3) are similarly untrue and unsupported by the record. In fact, the only such representations made to prospective bond purchasers were made by WPPSS itself and its own bond counsel, who testified in deposition that in reaching their opinion on the validity of the Participants' Agreement they made their own determination of the participants' authority and did not rely on the opinions of the participants' local counsel as to the participants' authority.

(*In re Washington Public Power Supply System Securities Litigation*, MDL No. 551) in which it stated, "BPA induced the 88 participants to sign their agreements by 'threat[ening] all utilities, particularly small utilities that were totally dependent on BPA for electricity, that they would be deprived of necessary power if they did not enter into the Participants' Agreements.'" The brief went on to state, "BPA also participated in the selection of the Supply System as the agency to plan, finance and construct the projects." Plaintiffs' Joint Memorandum In Opposition To Motion To Dismiss By The United States, Dec. 20, 1984, at 5-6.

[3]As one commentator has observed, "The participants in the WPPSS contracts, mostly small rural utilities, were necessarily passive partners in projects others assembled." Falk, *supra* n.1, at 51.

Petitioners mischaracterize the facts and try to mislead the Court by stating that the participants refused to "return" any portion of the bondholders' funds. (Pet. at 4, 8). Petitioners imply that the participants received the bondholders' money and refused to "return" it, when in fact the bondholders' money went not to the participants but to WPPSS (or, more accurately, to the underwriters who initially bought the bonds from WPPSS). The participants received nothing from the bondholders or from WPPSS and had nothing to "return." Similarly, petitioners misleadingly refer to WPPSS' expenditure of the bond sale proceeds as "their" (meaning the participants') expenditure of the funds. (Pet. at 11). The participants never received and never spent one dollar of bondholders' money; indeed, they never received anything of value from WPPSS' unsuccessful effort to build the uncompleted, now defunct nuclear plants.

Nowhere do the petitioners mention that the bonds in question are revenue bonds and not general obligation bonds. It is regrettable that WPPSS may lack sufficient revenues to meet its obligations to its bondholders, but the risk of such an occurrence was undertaken by the bondholders when they purchased revenue bonds issued by WPPSS rather than general obligation bonds (which WPPSS is prohibited by statute from issuing).

Petitioners tell this Court that the Washington Supreme Court "in a sudden, unjustified and unpredictable departure from all precedent, . . . retroactively manipulated state law so as to deny the bondholders any present remedy." (Pet. at 4). Nowhere do the petitioners favor the reader with the name of any Washington case or other precedent which was so startlingly departed from.[4] Nowhere do the petitioners mention the statutory framework and long history of Washington cases on municipal authority which the Washington Supreme Court carefully reviewed and relied on in reaching its two decisions.

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[4]In the entire petition only four prior Washington cases are cited. None represents precedent departed from.

Nowhere do the petitioners point out that what the Washington Supreme Court held invalid and unenforceable was the Participants' Agreement between the participants and WPPSS and not the bonds themselves or WPPSS' obligation to pay the bondholders principal and interest on the bonds as WPPSS—and not the participants—had promised to do.

Petitioners' statement of the case is so slanted, so filled with mischaracterizations and distortions of fact, and so wholly unsupported by the record, that it should be disregarded entirely. The salient facts are fairly set forth in the two decisions of the Washington Supreme Court reprinted as petitioners' Appendix A and Appendix B at A-5-10 and B-3-8.

REASONS FOR DENYING THE WRIT

No substantial federal question is presented by this case. Petitioners seek to persuade this Court to review two well reasoned decisions of the Washington Supreme Court interpreting Washington law governing the authority of Washington municipal corporations to enter into an agreement with another Washington municipal corporation. All aspects of the case are governed by state law. The invocation of the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments amounts to nothing more than petitioners' reworked refrain that the state court decided an issue of state law wrongly.

There is no substantial Takings Clause question, because (1) the Takings Clause, like the Contract Clause, does not apply to judicial decisions, (2) the decision below was consistent with established law of the state, and (3) the respondents cannot be charged with inducing the bondholders to make investments which turned sour. There is no substantial Due Process Clause question, because (1) the court below decided questions of law, not of disputed facts, (2) petitioners were not deprived of an opportunity to be heard on any relevant issues, and (3) petitioners have not shown any reason to believe the court below was not impartial.

A. There Is No Substantial Takings Clause Question

Petitioners' principal argument is that there has been a violation of the Takings Clause of the Fifth Amendment (amend. V, cl. 4), as incorporated in the Due Process Clause of the Fourteenth Amendment (amend. XIV, § 1, cl. 3). As the petition demonstrates, this contention, as applied to the facts of this case, is not easily articulated. Petitioners have not made clear their view as to (1) who did the "taking" (the Washington Supreme Court? WPPSS? the municipal participants?), (2) what acts constituted the "taking" (the announcement of a judicial decision? WPPSS' failure to pay what it owed on the bonds? the municipal participants' failure to pay to WPPSS what they did not owe?), or (3) what was "taken" (the money the bondholders voluntarily paid to buy the bonds? the bondholders' intangible right to receive payment from WPPSS, which right remains undisturbed although WPPSS unfortunately may lack sufficient revenues to make the payments?).

Upon reflection, it becomes clear that petitioners' appeal to the Constitution is not, in fact, a Takings Clause claim at all. Instead, its essence is that there has been a judicial action that petitioners believe "would have violated the Contract Clause" (art. I, § 10, cl. 1) if "the same action had been taken by the Washington Legislature" (Pet. at 22). Putting aside the merits of that contention, the point relevant to certiorari is that the act complained of was not taken by the Washington Legislature. The act complained of was the adjudication of contractual rights by a state court based on its interpretation of state law. For well over a century, this Court has held that judicial interpretations of law do not give rise to federal claims under the Contract Clause. *See Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924); *Ross v. Oregon*, 227 U.S. 150, 162 (1912); *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 30 (1887); *Commercial Bank of Cincinnati v. Buckingham's Executors*, 46 U.S. (5. How.) 317, 341-42 (1847).[5]

[5] *Amicus* Public Securities Association argues that the Contract Clause is violated by a judicial interpretation of law that is "serving as a substitute for, or an extension of, state legislative action." Brief at 17. The "exception" suggested by this argument is of such obvious breadth as to swallow the rule recognized by this Court in *Tidal Oil* and other cases discussed above.

Recognizing the futility of claiming a violation of the Contract Clause, petitioners seek to recharacterize that claim in terms of the Takings Clause. The only advantage of this new clothing for the Contract Clause argument is its relative novelty. This Court never has held that the quintessential judicial act—the interpretation of law—can consitute a taking of private property for which compensation is required.[6] Nor does the issue appear to have been pressed before.

The reasons for the absence of similar claims are obvious. First, the Takings Clause is not a general limitation on governmental actions, but a guarantee that the eminent domain power will not be abused: governmental activity does not implicate the Takings Clause merely because it alters preexisting expectations or affects valuable rights. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978). It is a truism that the line between legislative or administrative action that constitutes permissible governmental regulation, on the one hand, and action that so restrains the use of property as to constitute a taking, on the other, may sometimes be difficult to locate. But this Court's decisions do make clear that the degree to which preexisting expectations are frustrated is not itself determinative. Governmental action that admittedly alters clearly established, undisputed rights and thereby dramatically reduces the value of private property does not by that fact alone effect a taking of that property, as the unequivocal holdings of this Court plainly demonstrate. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

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[6]One Justice, in a concurring opinion, did suggest that a taking could occur by judicial interpretation of law, at least where the interpretation constituted a "startling" and "unpredictable" change, contrary to settled expectations. *Hughes v. Washington*, 389 U.S. 290, 294, 296-97 (1967) (Stewart, J., concurring). That opinion was not joined by any other Justice, nor has any subsequent opinion adopted that view. In any event, here the court below made no change adverse to petitioners of state law, much less a "startling" or "unpredictable" one.

While, in such circumstances, the decision whether a taking has occurred turns on a balancing of interests that resists ready articulation, the problem simply is not presented where, as in this case, judicial action is at issue. The reason for this distinction is simple: the essential premise for the taking inquiry is the abrogation of some established right of property ownership. *See Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The very issue in judicial interpretation of law, however, as exemplified by this case, is determination of such rights. The decision to abrogate rights that have previously been recognized by state law may or may not violate the Takings Clause; the determination what rights *do exist* under state law does not even implicate the Takings Clause. Judicial decisions, thus, lie wholly outside the ambit of this provision.

The second reason for the exemption of judicial acts from liability under the Takings Clause is the manifest undesirability of holding governments liable for judicial interpretation of law. This Court consistently has affirmed the existence of an unqualified immunity for judicial acts. *See Butz v. Economou*, 438 U.S. 478, 508-514 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). To make judicial decisions the basis for Takings Clause claims would contravene this established principle. Indeed, if judicial acts come within the Takings Clause, every judicial decision affecting the value of private interests could state a claim against the government.

Moreover, unless this Court sits to review state courts' construction of state laws,[7] the abrogation of immunity for judicial

[7]This Court often has declared that it does not sit as a court of appeals for resolution of state law claims; state courts will be the final arbiters of state law. *See, e.g., Hawks v. Hamill*, 288 U.S. 52 (1933); *Long Sault Development Co. v. Call*, 242 U.S. 272 (1916). That does not, of course, vouchsafe state court decisions against reversal: this Court has found state law irrelevant where superceded by federal law. *See, e.g., Hughes v. Washington*, 389 U.S. 290 (1967). But the appropriate question in this forum is whether state law is relevant and consistent with federal requisites, not whether the state courts properly have determined what is the state's law.

acts would make mistake of law by the complaining party a ground for compensation from the state. Thus, the finding that under state law no contractual right existed could not preclude the imposition of liability for the court's "taking" of those (nonexistent) rights, else judicial acts would never contravene the Takings Clause. If state courts' declaration of rights under state law can effect takings, there is no middle ground between two untoward results: either federal courts must usurp state courts' law declaring functions, or federal courts must require states to compensate persons who have, to their detriment, acted on misconceptions as to the law. The startling fact is not that this absurd construction of the Constitution has not previously been urged but, rather, that any petitioners could seriously propose to bring judicial interpretations of law within the Takings Clause ambit.

Although petitioners clearly interpret the Takings Clause in this fashion, they do not list as a "question presented" whether judicial acts can violate the clause. Instead, petitioners would have the Court break new ground without confronting the central issue head-on. They advance four subsidiary arguments to circumvent the obvious problem of making judicial acts the basis for Takings Clause liability: first, petitioners invoke a recent case as authority for reaching the judicial act here; second, petitioners claim that the Washington Supreme Court changed the law of that state; third, petitioners allege that their purchase of WPPSS bonds was induced by respondents; and, finally, petitioners conflate the Takings Clause, the Contract Clause, and the Due Process Clause, hoping that out of the resulting conceptual confusion will emerge a catchall constitutional remedy for the perceived wrong. These claims do not enhance the substantiality of the federal issue presented. Each claim, insofar as it is relevant to the federal issue, either seriously misconstrues legal precedent or fundamentally mischaracterizes the facts of this case. We address these additional claims, *seriatim*, below.

1. *Webb's* does not modify the judicial act rule.

Petitioners assert that this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), sup-

ports their argument that a taking can occur by judicial act. The assertion is unfounded. *Webb's* held that a taking occurred when a court clerk, pursuant to state law, appropriated for public use the interest on interpleader funds deposited with the court. The propriety of the judicial order for deposit of funds was not at issue. Nor was the (perhaps doubtful) state court construction of the state statute. This Court accepted the Florida court's conclusion as to Florida law, holding that what the statute authorized, and the clerk effected, was a taking. *Id.* at 163. This Court did not hold that the state court's interpretation of state law—or its order requiring the deposit of funds with the court, less clearly a judicial act excluded from the Takings Clause's ambit—constituted a taking of private property.

Webb's might be apposite here if petitioners challenged the Washington *statutes* interpreted below. They do not. Indeed, it would be absurd to claim that the state law authorizing subordinate public bodies to acquire power-generating facilities and to purchase power only under limited conditions effected an unconstitutional taking of petitioners' property. The state law did not compel petitioners to surrender any property. Petitioners invested in revenue bonds in the mistaken belief that Washington law authorized the participants to enter "take or pay" agreements that allegedly required payment even if the venture did not produce a single kilowatt of power. The failure of the venture combined with the petitioners' mistake of law made their investment a bad one. That hardly establishes the unconstitutional exercise of eminent domain power by the state. *Webb's* adds nothing to this contention.

2. The Washington Supreme Court's opinions effected no change in state law.

Petitioners rest their taking claim on the allegation that the decision in *Chemical Bank v. Washington Public Power Supply System*, 99 Wash.2d 772, 666 P.2d 329 (1983) *(Chemical Bank I)* constituted a "surprising" and "unprecedented" change in state law, a "sudden, unjustified and unpredictable departure from all precedent" (Pet. at 4). Even if such a judicial decision could constitute a taking, there has been no change of

law as alleged in the instant case. In fact no prior decision in Washington had addressed whether a Washington municipality was authorized to obligate itself to pay for electricity that it might not receive; but the reasoning that supports the court's holdings on the invalidity of such obligations and on the consequences of their invalidity is fully consistent with precedent under Washington law.[8]

For example, petitioners express surprise at the court's narrow standard for construing implied municipal authority. The court's decision on that issue followed longstanding precedent, cited by the court, that narrowly construed municipal power and that resolved doubtful claims of authority against the municipality. 99 Wash.2d at 792, 666 P.2d at 339-340, Pet. App. B-19.[9] Under Washington law, narrow construction is particularly appropriate where a municipality seeks to incur indebtedness based on general grants of authority to provide services. *See Edwards v. Renton*, 67 Wash.2d 598, 409 P.2d 153 (1965).[10] Even if there were consensus that the rule of narrow

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[8]Indeed, petitioners do not explain in what respect, from the standpoint of Washington precedent, the decision below was surprising. See n.4, *supra*.

[9]*See, e.g., Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 650 P.2d 193 (1982); *Port of Seattle v. State Utilities & Trans. Comm'n*, 92 Wash.2d 789, 597 P.2d 383 (1979); *In re Seattle*, 96 Wash.2d 616, 638 P.2d 549 (1981); *Pacific First Fed. Sav. & Loan Ass'n v. Pierce County*, 27 Wash.2d 347, 178 P.2d 351 (1947); *Griggs v. Port of Tacoma*, 150 Wash. 402, 273 P. 521 (1928); *State ex rel. Hill v. Port of Seattle*, 104 Wash. 634, 177 P. 671, 180 P. 137 (1919); *State ex rel. Hill v. Bridges*, 87 Wash. 260, 151 P. 490 (1915).

[10]Washington law contains various other provisions that constrain the powers of local governments. Washington Constitution, art. VIII, § 6 limits the amount of debt that a municipality may incur without a vote of the electorate. These respondents urged in *Chemical Bank I* that the municipal participants' obligations under the Agreement as interpreted by petitioners constituted "debt" within the meaning of that provision and thus violated the debt limit. In contrast to their suggestion to this Court that the participants "borrowed" the bondholders' funds, petitioners argued in the state court that WPPSS, not the participants, had borrowed money from the bondholders: "Under the Participants' Agreement, no Participant has issued its own bonds, nor has any Participant borrowed money; thus no 'debt' has been created. . . ." Memorandum of WPPSS In Support Of Plaintiff Chemical Bank's Motion For Summary Judgment, Oct. 6, 1982, at VI-5-6. It was in

construction is undesirable, that state law issue does not raise any question of federal constitutional law. In addition, the court noted that broader home rule powers were unavailable to the participants since, under longstanding state law (*see* Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash. L. Rev. 743, 771-72 (1963)), those powers could be exercised only with respect to purely local affairs. The court held simply that power projects intended to generate electricity for use throughout the Pacific Northwest could not be considered to fall within the category defined by Washington law as "local affairs."

Petitioners allege "surprise" at the narrow construction of municipal authority in this case and the consequent conclusion that the Participants' Agreement was invalid, insisting that no one could have foreseen this possibility. Yet parties that have financed public power projects with similar "take or pay" arrangements in other jurisdictions have foreseen exactly the same possibility under the law of other states. In virtually every other jurisdiction employing this controversial financing device, the obligation has been considered such a radical departure from traditional financing arrangements, and one for which municipal authority was so highly suspect, that its use has been preceded by a test case to determine its validity, by the passage of express authorizing legislation, or by both.[11] In

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response to this contention that these respondents argued (*see* Pet. at 20 n.12) that for purposes of applying the Washington Constitution's municipal debt limitation WPPSS should be deemed a financing conduit insofar as petitioners were seeking to saddle the participants with debt service obligations on bonds issued by WPPSS. The Washington Supreme Court found it unnecessary to reach that issue since it decided that the Participants' Agreement was void under the *ultra vires* doctrine.

[11]*See, e.g.*, S.C. Code Ann. § 6-23-110 (Law Co-op. Supp. 1982); Mass. Ann. Laws,ch. 164A, § 3(b) (Law Co-op. 1979); Me. Rev. Stat. Ann. Tit. 35, § 4103(1)(B) (Supp. 1982); N.C. Gen. Stat. § 159B-12 (1982); Va. Code § 15.1-1611 (1981); Vt. Stat. Ann., tit. 30 § 604 (Supp. 1982); *Johnson v. Piedmont Municipal Power Agency*, 287 S.E.2d 476 (S.C. 1982); *Frank v. City of Cody*, 572 P.2d 1106 (Wyo. 1977); *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. 1977).

this case, there was the same reason for question; petitioners, however, took no measure to ensure the validity of the arrangements prior to the sale of the bonds.

While the rule construing municipal authority narrowly was not changed, there was one arguable change in Washington law made by the Washington Supreme Court. That change, however, plainly benefitted petitioners. In prior decisions involving the right of municipalities to incur the risks associated with power generation facilities, the Washington Supreme Court consistently had required that municipalities retain the rights of ownership and retain legal control over the risk of project failure and, thus, had prevented municipalities from delegating authority except for purely ministerial functions. *See* 99 Wash.2d at 785-791, 666 P.2d at 336-339, Pet. App. B-12-18; *PUD 1 v. Taxpayers of Snohomish County*, 78 Wash.2d 724, 479 P.2d 61 (1971); *Roehl v. PUD 1*, 43 Wash.2d 214, 261 P.2d 92 (1953). As the court noted, its prior decisions had involved cases in which there was legal control over project risks because the municipalities had an actual ownership interest in the projects. Any change in this case took the form of a relaxed test that permitted municipalities to take the "dry hole" risk even if they could not demonstrate ownership of the projects, but only legal control equivalent to ownership.[12] Despite this relaxation of its previous requirement, the court ruled that the Participants' Agreement could not, as a matter of law, satisfy the test.

Finally, there is no merit to petitioners' claim that Washington law prior to *Chemical Bank v. Washington Public Power Supply System*, 102 Wash.2d 874, 691 P.2d 524 (1984) *(Chemical Bank II)* mandates restitution notwithstanding the invalidity of the underlying contract. The general rule, followed in Washington, is that restitution is available only where minor, technical defects impair the bonds' validity. *See, e.g.*,

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[12]The concurring opinion urged that the traditional strict "ownership" requirement be retained. 99 Wash.2d at 799-800, 666 P.2d at 343-344, Pet. App. B-26-27.

D'Esterre v. New York, 104 Fed. 605 (2d Cir. 1900); *Cuddy v. Sturtevant*, 111 Wash. 304, 190 P. 909 (1920); Uniform Commercial Code § 8-202, Official Comment 6. The rule, however, denies restitution altogether where bonds have been issued without legislative authorization. *See, e.g., Town of South Ottawa v. Perkins*, 94 U.S. 260 (1877). The decision in *Chemical Bank II* simply recognizes this limitation on estoppel and restitution rights, currently codified in the Washington Uniform Commercial Code as RCW 62A.8-202. What was at issue in *Chemical Bank II*, however, was not the validity of the bonds sold by WPPSS but the validity of the Agreement between the participants and WPPSS. Because the court held the Agreement did not constitute a "security" within the definition of RCW 62A.8-102(1)(a), there was nothing to trigger § 8-202 rights. 102 Wash.2d at 908-909, 691 P.2d at 543-544, Pet. App. A-35-36. As this holding was one of first impression, it is difficult to understand how it could form the basis for any constitutional claim predicated on change of law.

Petitioners' citation to *Noel v. Cole*, 98 Wash.2d 375, 655 P.2d 245 (1982), as conflicting prior state law is inappropriate. The statement which petitioners cite for the proposition that restitution is available here is a footnote to the following discussion by the court: "Under certain conditions, a private party acting in good faith [with a governmental agency that acted *ultra vires*] is entitled to some recovery. First, the agency must have had the power it sought to exercise but merely have exercised it in an irregular manner or by an unauthorized procedural means." 98 Wash.2d at 381, 655 P.2d at 249-50 (bracketed matter added). Here, the court expressly acknowledged the applicability of the *Noel v. Cole* test and then explicitly held that the contract involved in this case *was* outside the power sought to be exercised rather than simply the exercise of an authorized power in an irregular manner. 102 Wash.2d at 911, 691 P.2d at 545, Pet. App. A-37-38. Petitioners' claim cannot be that the Washington Supreme Court changed state law: instead, they ask this Court to substitute its judgment for the

state court's and declare state law on what constitutes a substantive, rather than procedural, *ultra vires* act.

In summary, petitioners fail to cite a single case in which the Washington courts had articulated a rule of law contrary to the decisions below. Petitioners' bald assertions of "sudden changes in state law" (Pet. at 17) and "retroactive manipulations of state law" (Pet. at 18) are nothing more than empty rhetoric.

This case, thus, bears no resemblance to any case where this Court has found it necessary to protect bondholders against state governmental actions. All such cases involved the express repudiation or devaluation of obligations notwithstanding legislative recognition that those obligations had been incurred validly under state law.[13] *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Port of Mobile v. United States ex rel. Watson*, 116 U.S. 289 (1886); *Von Hoffman v. Quincy*, 71 U.S. 535 (1867). Here, in contrast, this Court is not dealing with a situation in which an admittedly valid obligation has been deemed no longer to exist by legislative fiat. Rather, the Washington Supreme Court interpreted the "dry hole" obligation to be invalid at the first opportunity.

Moreover, the decision of the Washington Supreme Court not to grant restitution is entirely consistent with the holdings of this Court. Notwithstanding the misleading assertions by petitioners and *amici* that participants have refused "even to return the principal amount of the bonds" (Underwriter Brief at 5; *see* Public Securities Association Brief at 13), the simple truth remains that all bond proceeds were delivered to WPPSS. No proceeds were obtained by participants. Thus, the

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[13] *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1864), cited by petitioners unsuccessfully in the Washington Supreme Court, follows this pattern. That case involved an express reversal of state law after a bondholder relied explicitly on the initial state decision. This Court's decision on the point, which was not decided on constitutional grounds, see *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 454 (1924), does not survive this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Washington Supreme Court found that participants did not benefit from the bonds in a manner that would trigger any restitutionary right. 102 Wash.2d at 911, 691 P.2d at 545, Pet. App. A-38. Even during the period in the nineteenth century when this Court used restitutionary theories to prevent municipalities from being unjustly enriched by the issuance of void bonds, this Court consistently held that where "(t)he money received by the city . . . has long passed out of its possession, (bondholder funds) cannot be restored . . . ." *Litchfield v. Ballou*, 114 U.S. 190, 193 (1884). *A fortiori*, no recovery in restitution is available where the city never received any bond proceeds in the first instance. *See Parkersburg v. Brown*, 106 U.S. 487 (1881) (relief against city permitted only to extent bondholders could trace their funds into property purchased with bond proceeds and held by city).

3. There was no inducement by participants that could constitute a taking.

Petitioners next claim that the action of participants, conjoined with the opinion of the Washington Supreme Court holding the Participants' Agreement *ultra vires*, constituted a violation of the Takings Clause by defeating bondholders' investment-backed expectations. According to petitioners, bondholders' investment decision was made solely in reliance on representations by and conduct of participants. Perhaps the best response to this allegation is to note that it raises factual issues not properly before this Court. Petitioners submitted no affidavits to support this claim, and there was no finding in the state courts on the claim. Petitioners, therefore, have asked this Court to make a factual determination on a matter wholly outside the record of this case.

The bondholders cannot establish that the participants induced investment-backed expectations that the validity of the Agreement was beyond doubt. The mechanics of municipal bond issuance make plain that bondholders looked to parties other than the participants to ensure the validity of the underlying Agreement that presumably secured the bondholders'

investment. In this case, two bond counsel firms were asked to investigate and opine on the authority of participants to enter into the Agreement. Indeed, the opinion of expert bond counsel on the validity of the transaction is well recognized as the *sine qua non* of municipal bond issuance. *See* R. Lamb & S. Rappaport, Municipal Bonds at 289 (1980); *Amici* Underwriters' Brief at 4. WPPSS bond counsel's opinion, and no one else's, was printed in the Official Statement (the municipal bond equivalent of a corporate prospectus) for each issuance of bonds and on each of the WPPSS bonds. That opinion stated that bond counsel had "examined into the validity of" 72 of the 88 Agreements and had concluded that each such Agreement "has been duly authorized, executed and delivered by each of the parties thereto and constitutes a valid and binding agreement enforceable in accordance with its terms." There was no indication that bond counsel had relied on opinions of participants' own local counsel on the issue of authority or that investors knew of the latter opinions. As in all municipal bond transactions, bondholders were basing their investment decisions, and hence their investment-backed expectations, on bond counsel who were experts in public power financing through municipal bonds.

Petitioners also mischaracterize the appropriate scope of bondholders' "investment-backed expectations." Petitioners would have this Court believe that these investments were risk-free for bondholders, that the "business risk" was always intended to lie with the participants. (Pet. at 4). The facts speak differently. These bonds were not general obligation bonds, as to which the issuer pledged all its revenue producing power to ensure payment of debt service. *Cf. Flushing National Bank v. Municipal Assistance Corporation*, 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976). Rather, bondholders were informed that these were revenue bonds, payable only from revenues received by WPPSS through its ownership and operation of the projects at issue. The key distinction between general obligation bonds and revenue bonds, of course, is that on the former the issuer bears the risk of a

project's failure while on the latter the bondholders bear the risk of a project's failure.[14] For this reason, revenue bonds pay a higher rate of interest than general obligation bonds.

Even if individual bondholders were unaware of the risks inherent in these projects, the technical distinctions among bonds, and the legal constraints on municipal authority, their representatives—sophisticated underwriters, trustee and bond counsel—cannot claim such ignorance.[15] Nevertheless, in the face of a repayment provision which was novel in the jurisdiction involved, a multi-billion dollar cash outlay, and a venture involving localities from various states, neither underwriters, nor trustee, nor bond counsel took any action to ensure the validity of the Participants' Agreement prior to issuance of the bonds.

Petitioners and *amici* now claim that there was nothing they could do, that a declaratory judgment action was unavailable. As petitioners and *amici*, experts in the workings of the municipal bond market, are well aware, that statement is simply disingenuous. It is standard practice in the municipal bond

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[14]*See Chemical Bank I* concurring opinion, 99 Wash.2d at 804-805, 666 P.2d at 346, Pet. App. B-31-32.

[15]Petitioners argued below that one cannot justifiably rely on another's opinion as to municipal authority and therefore cannot claim to have been "induced" to act by such an opinion. Certain participants, including these respondents, had argued that in 1976, when WPPSS and BPA were urging the participants to sign up, WPPSS had failed to disclose to them the fact that its expert bond counsel had doubts about the legal authority of 16 of the 88 participants to enter into the Agreement. In response, counsel for Chemical Bank argued as follows in the state trial court: "Finally, the rule of law really is that if there had been a representation that the 16 had authority, and they didn't have authority, and that representation was made by the Supply System, it would not be a representation that would be material nor one upon which the participants could rely to later disavow their solemn promise, because the representation of what the law allows one to do is not a representation to be relied upon at the risk of the person relying. In other words, if somebody says somebody has legal authority to do something, you better check it out yourself, you don't have any right to rely on that kind of a representation." (Transcript, Oct. 12, 1982, at 382).

field to obtain pre-issuance validation by bringing a declaratory action or an action seeking special relief such as mandamus against an official or agency whose action is necessary to bond issuance. In form, such mandamus actions pray for an order requiring the official or agency to take, or enjoining it from taking, the action prerequisite to marketing of the bonds. *See, e.g., Johnson v. Piedmont Municipal Power Agency*, 287 S.E.2d 476 (S.C. 1982); *Massachusetts Home Mortgage Finance Agency v. New England Merchants National Bank*, 376 Mass. 669, 382 N.E.2d 1084 (1978); *Board of Supervisors v. Massey*, 210 Va. 253, 169 S.E.2d 556 (1969). Indeed, this is an accepted and time-honored mechanism for determining, prior to issue, the validity of bonds or other debts in the state of Washington.[16]

Furthermore, petitioners are wrong about the unavailability of ordinary declaratory relief. The Washington courts have construed the Washington declaratory judgment statute liberally and, in cases involving issues of major public importance, have dispensed with the usual requirement of an "actual case or controversy." *See, e.g., Seattle School District No. 1 v. State*, 90 Wash.2d 476, 489-490, 585 P.2d 71, 80 (1978); *Clallam County v. Board of Clallam County Commissioners*, 92 Wash.2d 844, 848-849, 601 P.2d 943, 945 (1979); *State ex rel. Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wash.2d 175, 178, 492 P.2d 1012, 1014 (1972).

Thus, petitioners and *amici* could have avoided this entire litigation by a device of which they simply cannot claim they were ignorant. They chose not to take any such action. Nor did they seek to procure express legislative approval, as deemed necessary and obtained in so many other jurisdictions. Instead, they ignored every opportunity to ensure the validity of

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[16]*See, e.g., State ex rel. Washington Toll Bridge Authority v. Yelle*, 56 Wash.2d 86, 351 P.2d 493 (1960); *State ex rel. Washington State Building Financing Authority v. Yelle*, 47 Wash.2d 705, 289 P.2d 355 (1955); *Henderson v. Town of Tumwater*, 46 Wash.2d 758, 285 P.2d 119 (1955); *State ex rel. Troy v. Yelle*, 36 Wash.2d 192, 217 P.2d 337 (1950).

the Participants' Agreement under state law and thus took the very risk of invalidity that has materialized, the very risk that bond counsel are hired to prevent.[17] Petitioners and *amici* cannot now bootstrap their discontent into a constitutional issue and impose this risk on respondents, as if unquestioned validity were their justifiable expectation induced by participants.

4. Amalgamating the Takings, Contract and Due Process Clauses does not provide a catchall constitutional remedy for every perceived wrong.

In addition to the Takings Clause, petitioners list the Contract Clause and the Due Process Clause of the Fourteenth Amendment as constitutional provisions relied on to establish the substantiality of their supposed federal question. They do not spell out their analysis of these other clauses. Instead, the petitioners rely on them obliquely, using the language of "impairment," freely mixing together citations to decisions under the three clauses, and, at the close of their taking argument, invoking the common spirit of the three clauses (Pet. at 22). The essence of their argument is that because bondholders have risked and lost a large sum of money, there must be something in the United States Constitution that will get that money back.

Petitioners' use of the three clauses is understandable. Separate analysis of each reveals no colorable federal question. The Contract Clause argument fails because petitioners are challenging a judicial act. The Takings Clause argument fails for

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[17] *Amicus* Public Securities Association asserts that it would be "impossible to maintain the efficiency of the current municipal bond market if prior judicial determination was necessary in all, or even most, instances." Brief at 4. This statement is simply irrelevant. The overwhelming majority of bond issues present no novel question of municipal law and thus require no prior judicial approval. Only in the rare case when a novel financing technique is being utilized, as here, or when bond proceeds will be dedicated to an enterprise of questionable public purposes, is prior approval necessary. In such cases, current practice is for the issuer, underwriter, or bond counsel to seek judicial or legislative approval. None was obtained here.

the same reason. As discussed above, the "change of law" and "inducement" arguments, even were they legally colorable, present hypothetical issues not raised by the facts of this case. And the substantive due process claim borders on the frivolous, given the disfavor into which precedents such as *Lochner v. New York*, 198 U.S. 45 (1905), have fallen. Petitioners need look no further than the case immediately following *Webb's* in the U.S. Reports for evidence of the burden that must be overcome to invalidate economic and social regulation on substantive due process grounds. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (sustaining, against a Fifth Amendment due process challenge, congressional legislation reducing retirement benefits for railroad employees who had worked up to 25 years for railroads in expectation of receiving certain benefits).

Given that the clauses taken individually do not reveal a substantial federal issue, petitioners' attempt to combine all three is unavailing. Although the clauses are not concerned with wholly unrelated issues, petitioners' attempt to fashion from the three separate clauses a general prohibition on any governmental action that adversely affects property interests (real or supposed) suggests a dramatic change in the Constitution. As with the several provisions protecting particular individual interests in liberty, the specific constitutional protection of property interests has been spelled out in three separate clauses, each shaped according to its particular purpose, context and history.[18] Melding the three into a general protection against governmental actions that affect property interests creates a broad, dangerous and unintended revisory power.

Petitioners suggest that this broad revisory power—even if not generally recognized—is appropriately exercised where state governmental actions disadvantage persons who are po-

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[18]The fact that they were adopted not as part of a single lawmaking effort but at three separate times spanning 80 years is but the most visible evidence of the difficulty of reading the clauses as a unitary constraint on governmental action.

litically powerless. Petitioners and *amici* at various points throughout their briefs argue that this is such a case.[19] *Amici* argue explicitly that the decisions of the Washington Supreme Court were "home town" decisions (City of Seattle Brief at 7) motivated solely by "protectionist" tendencies (Public Securities Association Brief at 6). Wholly apart from the consequences for federalism that would follow from this Court's impugning the motives of a state's highest court, there is simply no evidence that self-interest motivated the Washington decisions.

This Court, indeed, has on several occasions indicated its special concern for the powerless: the poor, the disenfranchised, and out-of-state competitors of entrenched in-state business. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). That concern, however, is utterly irrelevant here. First, purchasers of tax-exempt bonds are not those in low-income brackets, and merely listing the petitioners and some of their supporting *amici* reveals an impressive array, not of the impoverished, but of financial giants.

Second, these entities and the individuals they represent have considerable power to protect themselves. Certainly, underwriters, bond purchasers, and the brokers and bond counsel who advise them, are able to assess the risk of bond investments. They may guess wrong, but they have ample opportunity to evaluate the risk and choose to invest or not: no state official forces anyone to buy bonds. Moreover, underwriters, such as *amici*, exercise substantial control of the debt markets to which municipalities and states must have access to finance necessary capital projects. Their participation and co-

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[19]The statement at Pet. 8-9 concerning the holders of the bonds is unsupported in the record. Further, contrary to the implication there, the vast majority of the bonds, in terms of dollars purchased, are held by institutional investors. (Note petitioners' odd arithmetic, in which the supposed "average" holding of $15,000 times the supposed 45,000 total of all bondholders equals less than half the supposed holdings by individuals and less than one third of the $2.25 billion total face value).

operation is necessary if the State of Washington and its political subdivisions are to enjoy ready availability of credit at favorable interest rates. Thus, participants and state officials have substantial incentives to act in a manner consistent with underwriter and bondholder interests.

Third, largely as a result of the above, it is by no means clear that the interest of the residents of Washington is entirely in line with the decision of the Washington Supreme Court in this case. It was well understood in the State of Washington prior to *Chemical Bank I* that a decision against the underwriters would have an adverse impact on the financing capacity of the state and its municipalities. Indeed, the first claim of underwriters after the *Chemical Bank I* decision was that a default by WPPSS would lead them to charge higher interest rates for financings in the Pacific Northwest. *See, e.g., N.Y. Times*, June 16, 1983 at D9 (statement by underwriter that investors will "shun bonds" of the region after the decision).

No better evidence of bondholder influence could exist than the City of Seattle's *amicus* brief. Seattle argues that it and all Northwest non-participants in Projects 4 & 5 suffer a "lowered bond rating and 'WPPSS penalty' applied by the financial community" as a result of the Washington Supreme Court's decisions. City of Seattle Brief at 3. In short, Seattle implies that the Washington Supreme Court could have imposed the cost of the failure of the two nuclear projects either on the Washington municipalities that were participants, or on all Washington municipalities in the form of subsequent higher interest rates. It simply cannot be said that the latter choice, which may have affected adversely a greater number of the state's citizens, was a self-interested, protectionist act.

The laws of Washington, as interpreted by its highest court, strike a reasonable balance between delegation of power to local officials and restriction on those officials' authority. This balance may or may not advantage Washington residents generally, since the alternative to liability for "dry hole" risks may be higher financing costs for all capital projects. But the state

court's interpretation of state law, which follows from established state precedents, cannot plausibly be thought the basis for a claim of constitutional violation.

B. There Is No Substantial Due Process Question

Petitioners also claim that the Washington Supreme Court violated the Due Process Clause of the Fourteenth Amendment by denying them a hearing on two purported issues of disputed fact, by referring to a supposedly unavailable remedy, and by hearing the case with two justices who presumably used electricity in their homes. (Pet. at 23-27). We address each claim in turn.

1. The "control" issue.

Petitioners first claim that they should have been granted a hearing to determine whether the Participants' Agreement gave respondents "sufficient control" over the WPPSS projects to contract for "dry hole" risks. Petitioners assert the Washington Supreme Court intended this "factual" issue to be critical to their determination of municipal authority (Pet. at 23, 24). Petitioners admit, however, that the Washington Supreme Court rejected this interpretation of its *Chemical Bank I* decision, clearly holding that the issue of control was to be determined from the relevant documents as "a question of law" rather than a factual inquiry dependent on evidence of the contract's implementation. *Chemical Bank II*, 102 Wash.2d at 894, 691 P.2d at 536, Pet. App. A-20.

Petitioners' contention that the Washington Supreme Court initially declared the control issue to be one of fact is a plain misreading of the court's opinion. In both its *Chemical Bank I* and *Chemical Bank II* decisions, the Washington Supreme Court determined, as a matter of state law, that the Agreement by its terms did not confer sufficient control on participants to constitute the legal equivalent of ownership, where participants could only act through a part-time committee that was required expressly to disapprove on short notice proposed WPPSS actions on major matters. Moreover, under the Agree-

ment any such disapproval would not block the WPPSS proposal; it would merely cause the dispute to be referred to an outside consultant who might or might not decide the WPPSS proposal should become ineffective on the ground it was contrary to "prudent utility practice" (the only basis for disapproving a WPPSS proposal). Perhaps the clearest demonstration of the participants' lack of control is that under the Agreement the participants could not prevent WPPSS from terminating the projects if WPPSS determined *unilaterally* that it was unable "to construct, operate or proceed as owner . . . due to financing, licensing, construction or operating conditions or other causes which are beyond its control." Agreement, §§ 15 & 13(a)(1)(A).[20] Given the clear meaning of these clauses, the manner of their implementation was not relevant to the court's holding. Thus, no evidentiary hearing on implementation was necessary or appropriate.[21]

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[20]It is ironic that petitioner WPPSS argues to this Court that the Washington Supreme Court violated the federal constitution in concluding that the participants lacked control equivalent to ownership. In other litigation, concerning whether the Participants' Committee was subject to the state Open Public Meeting Act, WPPSS counsel told the state trial court: "The participants are purchasers of the power. They are not builders of the nuclear plants. . . . [The Participants' Committee] does not control the corporation. . . . [The Committee has] no authority and control over the board of directors, . . . The board of directors of the Supply System continues to have authority over the construction of the projects, . . . You couldn't have a more arm's length lack of control relationship . . . , and if the board of directors wants to terminate the projects, it can do so without the approval of the Participants' Committee, . . ." *Kahn v. WPPSS*, King Co., Wash. Sup. Ct. No. 81-2-10044-9, Transcript, July 8, 1981, at 15, 29-30.

[21]The court's determination of the control issue as a matter of law, moreover, is both appropriate and desirable to ensure predictability about municipal authority to engage in commercial transactions. Municipalities and those who deal with them must be able to determine the enforceability of a transaction at the time they enter into the contract. The consequence of allowing subsequent events to color the initial validity or invalidity of the underlying document is made clear by imagining a situation contrary to what arose in the instant case. Assume that the documents made clear that the participants had the right to exercise sufficient control over the projects to validate their taking the "dry hole" risk under state law, and that bonds were issued on that

2. The "equitable estoppel" issue.

Petitioners also complain that they were denied a hearing where they could establish facts to support their claim that participants should be equitably estopped from denying liability under the Agreement. However, no factual issue relevant to the court's holding was in dispute. The Washington Supreme Court decided that even if petitioners could prove reliance on statements by the participants, they would not prevail on their estoppel claim because the statements allegedly relied on were statements of law and, as a matter of Washington state law, such statements are not a basis for estoppel. 102 Wash.2d at 905, 691 P.2d at 542, Pet. App. A-32. Thus, no hearing right for the development of a factual record was triggered.[22]

Even if the representations allegedly relied upon by petitioners were representations of fact, this still would not give rise to a substantial federal question worthy of review. Contrary to petitioners' assertions, they had ample opportunity to establish a factual basis for their claim of equitable estoppel. Petitioners neglected to take that opportunity when they failed to file responsive affidavits to participants' summary judgment motions following *Chemical Bank I*. No evidentiary issue is raised when a party fails to respond and refute allegations. Thus, in such an instance, there is no denial of due process when a tribunal does not conduct an evidentiary hearing. *Professional Seminar Consultants, Inc. v. Sino American Technology Exchange Council, Inc.*, 727 F.2d 1470 (9th Cir. 1984);

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understanding. If it subsequently developed that participants abdicated their contractual right to control so that WPPSS was making all decisions unilaterally, we doubt the bondholders would accept the argument that subsequent events altered the previous legal status of their bonds. Similarly, bondholders may not now claim a right to demonstrate that subsequent events transformed transactions that were initially invalid for lack of control into ones that became valid.

[22]Petitioners apparently agree, as their counsel argued below: "In other words, if somebody says somebody has legal authority to do something, you better check it out yourself, you don't have any right to rely on that kind of a representation." See n.15, *supra*.

see also, Environmental Defense Fund v. Alexander, 614 F.2d 474 (5th Cir. 1980) (no denial of due process where both parties presented the issue of laches to the court in their briefs). Here, petitioners had the opportunity that they claim they were denied. There was no denial of due process.

3. The alleged unavailability of prior declaratory relief.

Petitioners claim the Due Process Clause was violated because the Washington court mentioned the possibility of obtaining prior declaratory relief as to the validity of the Agreement, which petitioners now say was unavailable to them. Petitioners' argument fails for two reasons. First, the mention of the possibility of such relief was not important to the court's decision and did not alter the result. Second, petitioners are simply wrong. Such prior determination of the validity or invalidity of the underlying agreements could have been obtained through declaratory judgment or mandamus proceedings or, if the legislature could have been persuaded to enlarge municipal authority in Washington, through legislation.

4. The alleged partiality of the tribunal.

Petitioners' final contention is that the decision of the Washington Supreme Court violated the Due Process Clause because that tribunal was not impartial. The entire explicit basis for this claim is contained in a footnote to the petition observing that two of the nine justices of the *Chemical Bank I* court lived in communities served by participant utilities. (Pet. at 27 n.22). Petitioners do not identify any case in which a remote, unspecified and in all likelihood *de minimis* interest has been held to mandate recusal as a matter of constitutional law. The cases to the contrary are conclusive. *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979); *see also, In Re Virginia Electric & Power Co.*, 539 F.2d 357 (4th Cir. 1976) (district court judge's remote and speculative interest in refund that might be ordered for electric utility customers was not sufficient ownership of a legal or equitable interest as to constitute a disqualifying financial interest in the litigation).

Petitioners' frequent reference to their nonresidence in Washington may be meant to suggest a second implicit ground for disqualifying the justices of the Washington Supreme Court: bias against bondholders who seek to extract a large sum of money from Washington residents. Were petitioners to advance this claim seriously, they would have to explain why, if the six justices forming the *Chemical Bank II* majority were biased, the three dissenters and the state trial judge were not, or why the Oregon Supreme Court (much cited by petitioners) was not similarly biased where claims against its residents were in issue. No serious question of partiality under the Due Process Clause exists.

CONCLUSION

Petitioners seek to elevate these state court rulings, on issues of state law, into a federal case by means of a conceptually muddled constitutional theory based on nonexistent facts. The underlying thesis of the petition seems to be that it is unthinkable and therefore "surprising" for a state supreme court to apply state law in a fashion that ultimately results in a $2.25 billion bond default. In short, it is only the amount of money involved in this case that transforms it from the garden variety case in which a state court holds that a contract is unenforceable under state law. Unwilling to admit this, petitioners urge legal theories that would create a federal question of constitutional dimension any time a state court holds a contract unenforceable under state law.

Two years after the decision in *Chemical Bank I*, the municipal bond market remains a vibrant part of our economy, with issues according to *amicus* Public Securities Association of $100 billion in 1984 alone. (Brief at 1). Petitioners' attempt to demonstrate a "destabilized" municipal bond market as a result of the decisions below is as unavailing as their attempt to discover a substantial federal question arising out of this litigation.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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